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IN THE

Supreme Court of the United States

October Term, 1957

No. 631

EMRAY REALTY CORP.,

Petitioner-Appellant,

v.

ROBERT C. WEAVER, as State Rent Administrator,

Respondent-Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY AFFIDAVIT OF ARNOLD SCHILDHAUS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ARNOLD SCHILDHAUS,
Attorney for Petitioner-Appellant,
320 East 149th Street,
New York, N. Y.

IN THE

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Petitioner-Appellant,

v.

ROBERT C. WEAVER, as State Rent Administrator,

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Reply Affidavit of Arnold Schildhaus in Opposition to Motion to Dismiss or Affirm

ARNOLD SCHILDHAUS, being duly sworn, deposes and says:

(1) That he is the attorney for the petitioner-appellant, and admitted to practice in this Court.

(2) Replying in seriatim to misstatement of facts, inaccuracies, omissions, errors, false inferences and conclusions contained in a brief accompanying motion to dismiss—the motion has never been received by deponent—that he begs the permissions of the Court to list these discrepancies.

(3) The appeal was made from the order of May 16, 1957 and not the order of April 4, 1957 because deponent believed that in order to ask this Court to review a proceeding in a state court, all remedies in the state courts

must be exhausted. The order of April 4, 1957 dismissed an appeal as of right taken pursuant to section 588 (1) of the Civil Practice Act which allows an appeal as of right where there is directly involved the construction of the constitution of the state or of the United States. The Court of Appeals dismissed the appeal upon the ground that no substantial constitutional question was presented. Petitioner-appellant in order to exhaust his remedies made a motion pursuant to section 589 of the Civil Practice Act for leave to appeal or in the alternative to amend the remittitur to state that a constitutional question was necessarily involved. This motion was denied by the Court of Appeals on May 16, 1957. A notice of appeal to the Supreme Court of the United States was filed with the clerk of the County of New York where the record was possessed, and a copy served on respondent-appellee.

Heretofore, respondent-appellee had made a motion to dismiss this appeal; that motion was denied in the Supreme Court of the State of New York, County of New York, by Mr. Justice Jacob Markowitz, on September 10, 1957. A certified copy of such order is attached hereto.

(4) Chapter 755 of the Laws of 1957 of the State of New York is entitled "The Emergency Housing Rent Control Law". It provides in section 10 (4): "Nothing in this act shall be construed to require any person to offer housing accommodations for rent, but housing accommodations already on the rental market may be withdrawn only after prior written approval of the state rent commission, if such withdrawal requires that a tenant be evicted from such accommodations." Attached to this reply brief is the brief of petitioner-appellant to the Court of Appeals in the first *Emray* case (307 N. Y. 772) decided in July 1954. It was demonstrated in that brief that the language of the New York statute was an exact copy of the language of Section 4 (d) of the Emergency Price Control Act of 1942 (56 Stat.

28) and regulations issued pursuant thereto listed in the accompanying brief. This section was repeated in the Housing and Rent Acts of 1947 and that of 1949 (62 Stat. 99, Section 302; 63 Stat. 29, section 302).

This Court and the various courts of appeal in the circuits have considered and passed upon this clause. This Court in *Bowles* v. *Willingham* (321 U. S. 503), said that this clause was essential to the constitutional validity of the Price Control Act. The Circuit Court of Appeals in *Taylor* v. *Bowles*, 145 Fed. (2d) 833; *Woods* v. *Durr*, 170 Fed. (2d) 976, 176 Fed. (2d) 273; and *Wilson* v. *Brown*, 137 Fed. (2d) 348; had ruled that the Price Administrator and the Housing Expediter must issue certificates of eviction if a landlord states that he wishes to withdraw his house from the rental market. The statement on page 3 that: "the Administrator is charged under the State Rent Act, with the burden of determining whether the landlord in good faith seeks to withdraw his property without any intent to rent or sell" does not appeal anywhere in the statute creating rent control. Nor is it accord with the decisions of federal and state courts—all of the state had rent control, today only the City of New York, a few isolated towns and cities in New York, and a few small towns in Connecticut still have rent control—all of the these courts have stated that a stated wish to withdraw on the part of the landlord is sufficient.

The first *Emray* case here discussed is the leading case in New York on the question of withdrawal from the rental market; the law reviews in commenting on the case have stated that the right to withdraw in New York is "nebulous" (N. Y. U. Law Review, December 1956).

The statement is made in the brief that: "The cases are legion in which the State Rent Administrator has authorized withdrawal by sincere landlords." This is more than a gross exaggeration; in no case where a landlord

wished to close up a building because he was either losing money, or faced criminal prosecution, or because the house in its opinion was unprofitable to repair or any combination of these has withdrawal ever been granted.

(5) The purported refusal of the Administrator—as contained in the Order and Opinion of the Administrator which is part of the certified record submitted to this Court—was based on the failure of petitioner-appellant to supply the books of the corporations that owned this house for audit. It was the position of the Administrator that a profit and loss statement accompanied by bills and checks were not sufficient. The profit and loss statement showed rent collections of $2654.80 and expenses of $33,561.33—a net loss of $30,906.53. Of these expenses $13,917 represented fixed charges. Nowhere were these fixed charges challenged or disputed. The only items challenged were certain items of repairs. These the Rent Administrator sought to blow up and magnify. As the petition points out in detail, each of these disputed items is triply corroborated; most are corroborated by the Administrator by orders acknowledging that the work was completed. But even disregarding these disputed items; the undisputed items show that this building was operated at a huge loss year after year.

The attempt of the Administrator on page 3 of his brief to inject a new issue of good faith, raised here for the first time, is one that he always tries to inject into every appeal. He had forgotten previously in this case. The statement that "this is simply a case in which this landlord has failed where others have succeeded" is new and simply untrue.

(6) The statement on page 3 that "the temper of the appeal is exemplified by the wholly irresponsible charges levelled against the Supreme Court, the Appellate Division and the Court of Appeals of the State of New York", it is most humbly submitted that no charges were levelled

against any of these great courts. The statement is true that this house and its attorney have received tremendous adverse publicity in every newspaper in New York City except the New York Times, the New York Herald Tribune, and the New York Evening Journal which have presented the facts fairly. Rent Control is very popular with tenants in New York.

(7) On page 4 appears the statement denying threats and intimidation of witnesses. These charges were made before Mrs. Zimmerman, the hearing officer of the Administrator. Contractor after contractor refused to appear to testify as to the cost of removing the violations; and the few that were induced to come refused to stay when they saw Mrs. Rogers, Deputy Commissioner of Housing, and Barney Malone, her assistant. Others stated that they were warned not to testify.

I regret to say this, but many attorneys refused to represent petitioner-appellant or its attorney even for large fees. Most were personal friends and acquaintances of petitioner's attorney who felt that they would incure the enmity of powerful political personages. This was true of only a small percentage of lawyers.

(8) On page 4 is the most serious charge of all against petitioner-appellant—"the appellant has injected numerous references to criminal convictions—Bar Association and Internal Revenue investigations of its attorney of record, Arnold Schildhaus. These were never part of the proceedings before the State Rent Administrator." It takes an awful lot of guts to make a statement like that to the Supreme Court of the United States. The petition in this proceeding which is sought to be reviewed in this Court alleges in paragraphs 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 21, 21, 22, 23, 24, 25, 26, 33, 34 and 35 the criminal convictions and investigations. More than half of the paragraphs in the petition which is included in the certified

record on appeal deals with these convictions of the attorney for the landlord who does not own a share of stock in the owning corporation and who has not been permitted to walk away from this house or resign. Any attempt to resign or walk away is met by a prosecution. As the Jurisdictional Statement alleges on pages 5, 6 and 7; these statements were taken from the petition in the N. Y. Supreme Court.

Incidentally in connection with the report of attorney for the petitioner-appellant to the Treasury Department as the petition states in paragraph 26; the subpoena for the production of the books of the corporation that owns this building were served on him while in the offices of the State Rent Administrator. He had told no one that he was going to go to that office; he went there without an appointment and was detained under one pretext or another until the subpoena was served. The Rent Administrator then denied the request to withdraw primarily because he was not permitted to audit the books of the corporation. It would be unfair to state that petitioner-appellant's attorney had not stated his position that he believed the books were not the best evidence and were self-serving.

(9) On page 4 is omitted the statement that the Appellate Division reversed because petitioner-appellant had not been accorded due process.

(10) The statement on page 5 that: "There, for the first time in these proceedings, landlord raised the question of withdrawal from the rental market" is most untrue. The Court of Appeals is a constitutional court of limited jurisdiction. It cannot consider questions raised there for the first time (N. Y. State Constitution, Article 6, Section 7). The brief of petitioner-appellant to the Court of Appeals was addressed to the inherent unfairness and injustice of the proceedings. The Court of Appeals agreed and besides reversing, to use their words "in the interest of

justice" they ordered a hearing as to whether this house should be withdrawn from the rental market.

(11) Included in the Appendix is the opinion of the Court of Appeals in the first *Emray* case (307 N. Y. 772). The brief in that case is also attached to this affidavit to show that as long ago as 1954, a main contention of petitioner-appellant was that its officers and attorney were being prosecuted criminally.

(12) The statement on page 5 that "the mandate of the Court of Appeals was that the Administrator reprocess this case and, in addition apply the objective standard of Section 59 of the Rent and Eviction Regulations" is untrue. The opinion of the Court of Appeals is printed in the Appendix. It deals with the question of confiscation which is not mentioned in Section 59 of the Regulation. Moreover, all orders were reversed, and a hearing restricted to the question of withdrawal from the rental market which was to be conducted under procedures and topics contained in the opinion. As to Section 59 of the Regulations, the Court of Appeals has stated in *New York University* v. *Temporary State Housing Rent Commission*, 304 N. Y. 131 its opinion of Section 59 on page 149:

> "As to the regulation's requirement that undue hardship, immediate necessity, etc. be shown, the problem is, perhaps a little more difficult. There may be doubt that the commission had power to impose such a regulation, in view of the statutory language, and policy which gives a landlord a right to withdraw the accommodation. To allow the commission to impose further requirements of hardship, necessity, etc. would seem, not only to be inconsistent with the statute itself but to be of doubtful constitutionality, as prohibiting a landlord from turning his own property to a nonrental use."

(13) Page 6 has so many mis-statements of fact, misleading inferences, omissions and errors that no purpose would be served in citing page and verse. Moreover, it is an outrageously unfair statement of the proceedings. Line by line contains omissions, and inferences that are unfair. The first line omits that the hearing was held after attorney for the petitioner brought a mandamus proceeding. Line 2 tries to create an inference; this Court may ask what kind of a house is being sought to be withdrawn from the rental market. This is the description given by the second ranking attorney of the Rent Commission in a brief to the Appellate Division, First Department in 284 A. D. 880 between the same parties involving this house: "In general, this second proceeding was based upon a more comprehensive inspection of the building which had been made by investigators and examiners for one or more municipal agencies concerned with maintenance of tenants' services required by law. As might be expected, the inspection and report was more complete than that conducted my the Local Rent Inspector and disclosed derelictions by the landlord far in excess of those adopted as a basis for the 'first order'.

The appellant has never filed a Protest against the 'second order' and his time to do expired on September 18, 1954.

In the first proceeding, begun by tenants on February 5, 1954, the complaints briefly summarized were that accumulated filth in an abandoned dumbwaiter shaft in the rear yard, and in the public parts of the building proper had caused vermin and rat infestation. Flash fires were of frequent occurrence. Throughout the building in public hallways, the lobby and even in the apartments, plaster had deteriorated and fallen away to such an extent that open holes existed. The seriousness of this condition was magnified by the presence of vermin and rats.

Plaster throughout the building was cracked and flaky. Every public part of the building was in need of paint, which generally had deteriorated to such an extent that it was peeling or had fallen away from the plaster entirely. Plumbing was faulty. Public mail boxes were broken. Windows throughout the building were defective. The roof leaked seriously. Door bells were inoperative and the heating plant was so ineffective that that service was rendered only on a spotty schedule. In a similar vein, almost every phase of the building operation was criticized.

An inspection was made by a Local Rent Inspector, whose report verified the existence of the conditions thus generally described. The building was described as being in 'deplorable and filthy condition.'" On page 12 of that brief the statement is made: "The proof before the Administrator established, almost without opposition, the filthy and deplorable condition of this building."

This is the house that petitioner-appellant is not allowed to withdraw from the rental market.

(14) The other statements on page 6 are not true; but they have been previously discussed. The first two lines on page 7 have been urged for the first time before this Court. There is nothing in the Record to support either. The hopeless conflict is one that the Administrator is trying to create. The issue of good faith is being urged here for the first time. The brief of the Rent Administrator in the Appellate Division mentions good faith only once in a 20 page brief. On page 2, he says: "Thus, there was not even an attempt to establish landlord's good faith by valid objective standards."

(15) It is most humbly suggested to this Court that what is being attempted is to try to create a factual situation where none exists. Just as the issue of good faith is being urged here for the first time for the purpose of confusion; so all other claims disappear and leave these facts. That petitioner-appellant is being compelled to operate a

building which has lost from $10,000 to $30,000. Nowhere in the entire record is there a denial that this building lost substantial sums of money in its yearly operation. Even if we go along with the Administrator and disallow certain items the building lost huge sums in its yearly operation. Nor can all the wind and fury disguise the fact that this is an old and obsolescent building that is a fire trap and should not be occupied. The description by the attorney for the Administrator cannot now be disavowed. Nor can it be denied that rents cannot under the law be collected for most of the apartments. There was an attempt to divorce this proceeding from the jailing of the attorney for the landlord to compel the operation of this house against his and the owners will. The attorney has been held as a hostage to compel the operation of this house; when he attempts to flee he is arrested and compelled to operate the building. The various records of convictions in the Magistrates' Court and the Court of Special Sessions you have before you. No false issues can obscure these facts.

Nor is this an unusual case. There are at least 53,000 others in the same position who are compelled to operate buildings at losses most have been fined, some have been jailed. All have buildings more than 57 years old.

(16) On page 7, it is stated that the decision of the court was predicated on the non-constitutional issue of whether, on the record before him, the State Rent Administrator was arbitrary or capricious. Nothing could be farther from the truth. The order of Mr. Justice Lupiano in the Supreme Court of the State of New York whose order was affirmed by the Appellate Division, First Department; and the appeal dismissed and leave to appeal denied by the Court of Appeals; states the reason for such denial as:

> "Its finding that petitioner allegedly seeking to withdraw the building from the rental market, had failed to meet the requirements therefore laid down in Section 59 of the Rent and Eviction Regulations has

sufficient warrant in the record produced before me both in fact and law."

Petitioner-appellant had not made an application pursuant to Section 59. It had insisted throughout that Section 59 as well as the rest of the rent law was unconstitutional. It had insisted that the emergency if there was one was created by this rent control law.

(17) The statement on page 8 that the Appellate Division after hearing extensive argument, and after searching interrogation of landlord's attorney is untrue. If allowing him ten (10) minutes to argue this case is hearing extensive argument then deponent is in error.

(18) The statement on the bottom of page 8 contains error. The motion was for leave to appeal or to amend a remittitur to state that a constitutional question was present. The stated ground for refusal is unusual and puzzling.

(19) The historical background contains so much error that this Court is most humbly and respectfully referred to the brief submitted in the first *Emray* case to the Court of Appeals. It is humbly submitted that it represents a good research job. The Emergency Housing Rent Control Law itself is a confession by the Legislature that no emergency exists. It removes rent control in those communities where the preponderant voting majority own homes; and retains rent control where the preponderant voting majority are tenants. Even in New York City, in order to placate a large group of voters who are owners of small houses, Section 2 (i) provides for decontrol.

ARNOLD SCHILDHAUS

Sworn to before me this
18 day of December, 1957

P. C. D'ONOFRIO
Notary Public